IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
September 14, 2009 Session

ROCKY TOP REALTY, INC., v. DEBRA YOUNG AND KYLE LANE

Direct Appeal from the Chancery Court for Knox County
No. 169264-3 Hon. Michael W. Moyers, Chancellor

No. E2009-00338-COA-R3-CV - FILED JANUARY 13, 2010

In this action, plaintiff acting as a facilitator, introduced buyer to defendants who then sold the real property to the person introduced to them by the facilitator. Plaintiff brought this action seeking a fee for its services. The Trial Court held there was a quasi contract and awarded plaintiff a judgment based on evidence that a realtor under a contract with the seller upon the sale of the property would be entitled to a real estate commission of 10%. Both parties have appealed and we affirm the Trial Court's finding that the evidence established a quasi contract between the parties, but vacate the judgment as to both defendants. Defendant Lane was dismissed from the action because there was no evidence that he had any interest in the property, and the judgment is vacated as to Young because the Trial Court applied the wrong measure of damages. We remand the case to the Trial Court to hear evidence as to the actual value of the services rendered by the facilitator to Young, and base a judgment on the value of those services in the capacity as a facilitator. The cost of the appeal is assessed one-half to Rocky Top Realty, Inc., and one-half to Debra Young.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Reversed in Part, and Judgment for Damages is Vacated.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, J., and JOHN W. MCCLARTY, J., joined.

Bernard E. Bernstein and L. Caesar Stair, IV., Knoxville, Tennessee, for appellants.

Raymond E. Lacy, Knoxville, Tennessee, for appellee.

OPINION

In this action the Complaint alleged that the defendants Lane and Young employed Sonny Mullins, the company's authorized representative as a facilitator in connection with the sale of property located at 3005 Clear Springs Road, Mascot, Tennessee and that defendants agreed to pay a facilitator's fee of $200,000.00 to Mullins. The Complaint averred that Young failed to honor the obligation to pay the facilitator's fee, and that Young "held some interest in the Property in her name as nominee for Mr. Lane and that Mr. Lane held himself out as the owner of the property." The complaint sought an award of $200,000.00 in damages, or alternatively, plaintiff averred that it was entitled to $200,000.00 in quasi contract as the value of the benefits conferred upon the defendants by plaintiff.

Defendants answered, and denied employing Rocky Top or Sonny Mullins in connection with the sale of the property, and further denied that they agreed to pay Rocky Top or Sonny Mullins a facilitator's fee of $200,000.00 or any other consideration. The answer further stated that Young owned the property at issue and that Lane never had any legal interest in the property.

The Trial Judge heard the case on November 19, 2008, and Mullins testified, as well as an expert regarding the customary payment of fees or commissions in connection with real estate sales. Young and Lane also testified.

The Trial Court rendered an opinion on the day of trial and entered a judgment on January 21, 2009 in which he incorporated his memorandum opinion, and gave judgment in favor of the plaintiff against Young and Lane, jointly and severally, in the amount of $135,000.00.

The findings of fact and conclusions of law set forth in the memorandum opinion are as follows:

> Defendant Debra Young was the owner of the tract of land at issue.
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> Ms. Young and defendant Kyle Lane had prior real estate dealings with plaintiff, Sonny Mullins.
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> Mr. Mullins either contacted Mr. Lane or Mr. Lane contacted Mr. Mullins and they discussed the sale of Ms. Young's property and a possible sale price.
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> Subsequent to the conversations between Mr. Lane and Mr. Mullins, Mr. Mullins appeared at the home of Ms. Young and Mr. Lane with an executed contract offering 2.7 million dollars for the subject property.
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> After conversation between the two defendants and some changes to the contract, defendants agreed to sell the property to the buyer who had been introduced and

> brought to them by Mr. Mullins.
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> Mr. Mullins claims that there was an agreement that he would be paid a $200,000.00 commission for his efforts by the defendants. The defendants deny that there was an agreement as to any commission.
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> There was no written, executed contract between the parties that set forth an agency relationship between the defendants and the plaintiff or that spelled out any commission that plaintiff would be entitled to in the event he procured a buyer for the defendants' property.
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> In Tennessee a brokerage contract may be oral and, as such, may be enforceable and not fall within the provisions of the statute of frauds. Based on the holding of *Alexander v. C. C. Powell Realty Company*, 535 S.W. 2d 154 (Tenn. Ct. App. 1975), an oral contract for brokerage and commission must be proven by clear, cogent, and convincing evidence.
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> Here, the proof of an oral contract consisted of plaintiff's testimony, which was disputed by the defendants and uncorroborated, fell short of the clear, cogent and convincing standard. Thus, the evidence presented was insufficient to predicate a judgment against the owner of the land for a brokerage fee. The only evidence that there was any agreement between the parties was Exhibit 8, a hand written statement by plaintiff that was not signed, initialed or otherwise acknowledged by the defendants.
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> Thus, the Court finds that there was no oral contract.

The Court relied on *Crye Leike*, *Inc. v. Ouer*, No. W2003-02590-COA-R3-CV, 2004 WL 2607543 (Tenn. Ct. App. Nov. 6, 2004), which stated that actions brought upon theories of unjust enrichment, quasi contract, contracts implied in law and quantum meruit are essentially the same. The Court cited *Paschall's Inc. v. Dozier*, 407 S.W. 2d 150 (Tenn. 1966) for the five elements a court must find to award a judgment on the basis of quasi contract, unjust enrichment, contracts implied in law or quantum meruit. Those elements are: (1) there must be no existing, enforceable contract between the parties covering the same subject; (2) the party seeking recovery must prove it provided valuable goods and services; (3) the party to be charged must have received goods and services; (4) circumstances must indicate that the parties involved in the transaction should have reasonably understood that the person providing the goods and services expected to be compensated and; (5) the circumstances must also demonstrate that it would be unjust for the party benefitting from the goods and services to retain them without paying for them.

The Court found that the evidence supported the five essential elements of quasi contract, as there was no contract between the parties as to a commission or fee to be paid to plaintiff. Mullins procured a buyer who purchased the defendants' property. The defendants accepted and financially benefitted substantially from Mullins introducing the buyer to Young. The defendants testified that they expected the buyer to pay Mullins' fee or commission, however, the evidence showed that in past dealings the defendants, as sellers, had paid Mullins' fee and testimony showed that it is generally the seller who pays the commission. The Court concluded that it was unreasonable that the defendants would have expected Mullins to facilitate the transaction without being compensated. The defendants benefitted from Mullins' efforts, and it would be unjust not to be compensated.

However, the Court also noted that Mullins did not put a great deal of effort into facilitating the transaction as the entire deal took place over a period of two or three days. Under these circumstances, the Court found it would be unjust to award the plaintiff the full commission of 10 percent that is normally paid in a raw land real estate transaction, but the Court found that the buyer and seller were equally benefitted by the efforts of Mullins. The Court concluded that equity would suggest that Mullins should seek his compensation in quasi contract equally from the defendants and from the buyer because they received an equivalent benefit from his efforts. The commission from each party would then be 5 percent of the sale price of 2.7 million dollars. Accordingly, the Court found that under a theory of quasi contract the plaintiff was entitled to a judgment of 5 percent of the contract price, which is $135,000.00, but declined to award pre-judgment interest.[1]

The judgment was entered against both defendants even thought the Court found that Young was the sole owner of the property. Further, while the Court found that both defendants substantially benefitted financially from Mullins' efforts, the Court did not explain how Lane benefitted.

The issues raised by the parties on appeal are:

A. Whether the Trial Court erred in awarding a judgment in favor of the plaintiff under the theory of quasi contract?

B. Whether the Trial Court erred in calculating plaintiff's damages?

C. Whether the Trial Court erred when it found that there was no oral contract between the parties?

D. Whether the Trial Court erred when it found that there was no implied in fact contract?

A trial court's findings of fact in a non-jury trial are reviewed *de novo* upon the

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[1]The discussion in the memorandum opinion regarding the buyer paying Rocky top $135,000.00 is dicta. The buyer was not a party to the litigation and the Trial Court did not have subject matter jurisdiction over that person.

record. The trial court is afforded a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13 (d); *Wright v. City of Knoxville,* 898 S.W.2d 177, 181 (Tenn. 1995). We review the Trial Court's credibility determinations with great deference. *Keaton v. Hancock County Bd. of Educ.,* 119 S.W.3d 218, 223 (Tenn. Ct. App. 2003). The trial court's conclusions of law are reviewed under a purely *de novo* standard with no presumption of correctness. *Taylor v. Fezell***,** 158 S.W.3d 352, 357 (Tenn. 2005)*, Union Carbide Corp. v. Huddleston* 854 S.W.2d 87, 91 (Tenn. 1993). The determination of the standard to apply when measuring damages is a question of law to be decided by the appellate court, *Hopper*, 2005 WL 2077650 at *7, while determining the amount of damages is a question of fact. *Hopper,* 2005 WL 2077650 at *12 (citing *Beaty v. McGraw*, 15 S.W. 3d 819,827 (Tenn. Ct. App. 1998).

Defendants Young and Lane, contest the Trial Court's judgement that they owed plaintiff, Rocky Top, $135,000.00 under the theory of quasi contract. Rocky Top contends the Trial Court erred when it did not find either an oral contract or an implied in fact contract between the parties for the payment of a facilitator's fee by defendants to plaintiff for Mullins' efforts.

The Trial Court rejected plaintiff's contention that there was an oral contract between the parties as to a facilitator's fee. The Trial Court acknowledged that in Tennessee a brokerage contract may be oral and, as such, may be enforceable and it does not fall within the provisions of the statute of frauds. The Trial Court was also correct when it stated that the existence of an oral brokerage contract must be proven by clear, cogent and convincing evidence. *Alexander v. C. C. Powell Realty Company*, 535 S.W. 2d 154, 157 - 158 (Tenn. Ct. App. 1975). It is well established in Tennessee that a contract can be express, implied, written, or oral, "but an enforceable contract must result from a meeting of the minds in mutual assent to terms, must be based upon sufficient consideration, must be free from fraud or undue influence, not against public policy and must be sufficiently definite to be enforced." *Williams v. Coffey*, No. E2007-01476-COA-R3-CV, 2008 WL 178860 at * 3 - 4 (Tenn. Ct. App. Apr. 21, 2008)(citing *Ferguson v. Nationwide Property & Cas. Ins. Co.* 218 S.W.3d 42, 49 (Tenn. Ct. App. 2006)).

In this case there is no clear, cogent and convincing evidence to prove that there was a meeting of the minds in mutual assent between the parties regarding a facilitator's fee. Mullins testified that the defendants had agreed to pay him a facilitator's fee of $200,000.00. Both Young and Lane testified they had never discussed a facilitator's fee or commission with Mullins in connection with the sale of the Clear Springs property. The only evidence presented to corroborate Mullins' testimony was his own hand written statement on the back of a computer generated property tax document that was not signed or initialed by the defendants and did not reference them in any way. The handwritten note is insufficient to support his testimony that there was an oral contract regarding a facilitator's fee. The evidence does not preponderate against the Trial Court's finding on this issue. In this connection see, *Alexander, pp.* 157 - 158.

Here, consistent with the court's holding in *Alexander,* Mullins' testimony alone is insufficient to establish an oral contract between the parties that would oblige the defendants to pay the plaintiff a commission or facilitator's fee.

Appellants contend the Trial Court was in error when it held plaintiff was entitled to a judgment under the equitable theory of quasi contract. This Court recently reviewed the elements necessary for a finding of quasi contract in *Williams v. Coffey*, 2008 WL 1788060 at * 3 - 4 (Tenn. Ct. App. Apr. 21, 2008) as follows: Under Tennessee law there are two distinct types of implied contracts: contracts implied in fact and contracts implied in law, which are often referred to as quasi contracts. A contract implied in fact arises under circumstances which show mutual intent of assent to contract, consideration and lawful purpose. *Thompson v. Hensley,* 136 S.W.3d 925, 929 - 30 (Tenn. Ct. App.2003). In contrast to a contract implied in fact, "contracts implied in law are created by law without the assent of the party bound, on the basis that they are dictated by reason and justice." *Ferguson v. Nationwide Property & Cas. Ins. Co.* 218 S.W.3d 42, 50 (Tenn. Ct. App. 2006). The Supreme Court established that a party seeking to recover on an implied contract in law or quasi contract theory must prove the following elements: (1) there is no existing, enforceable contract between the parties covering the same subject matter; (2) the party seeking recovery proves that it provided valuable goods or services; (3) the party to be charged received the goods or services; (4) the circumstances indicate that the parties to the transaction should have reasonably understood that the person providing the goods or services expected to be compensated and; (5) the circumstances demonstrate that it would be unjust for a party to retain the goods or services without payment. *Doe v. HCA Health Services of Tenn., Inc.,* 46 S.W.3d 191, 197-98 (Tenn. 2001).

The most cogent factor for consideration regarding recovery under a quasi contract is unjust enrichment of the parties. *Paschall's, Inc., v. Dozier,* 407 S.W.2d 150, 154 (Tenn.1966). Once a court has established that the five factors have been met, a quantum meruit recovery is limited to the actual value of the goods and services received by the defendant. *Castelli v. Lien,* 910 S.W.2d 420, 427 (Tenn. Ct. App.1995). The reasonable value of services should be based on the customs and practices prevailing in the same sort of business in which the services would normally be provided. *Chisholm v. Western Reserves Oil Co.,* 655 F.2d 94, 96 (6th Cir.1981). To prove the reasonable value of the goods and services, the party seeking to recover in quantum meruit can explain the method used to arrive at the fee or offer proof from other professionals in the same business or trade. *Nations Rent of Tenn., Inc. v. Lange,* Nos. M2001-02368-COA-R3-CV, M2001-02360-COA-R3-CV, M2001-02366-COA-R3-CV, 2002 WL 31467882 at * 2 (Tenn. Ct. App. Nov. 6, 2002); *Castelli*.

Defendants concede that the evidence supported a finding that the first three factors were present. Thus, Mullins provided Young with the valuable service of a facilitator by bringing the seller and buyer together so the sale could be accomplished and that Young received that service when she accepted the offer and she financially benefitted from it once the property was sold. The Trial Court did not address the issue of what services were brought to Lane by Mullins. Lane had no ownership interest in the property, and thus he had no property to sell and no need for a facilitator's services. The evidence preponderates against a finding that Lane benefitted financially from the sale of the property which Mullins facilitated by introducing the buyer to defendants. We reverse the Judgment entered against Mr. Lane and dismiss him as a party. *See*, Tenn. R. App. P. 13(d).

Next, Young contends that the Trial Court's finding that the fourth factor was met was error. The Trial Court reasoned that although defendants testified that they expected the buyer to pay Mullins' fee or commission, the evidence showed that in past dealings the defendants, as sellers, had paid Mullins' fee and testimony showed that it is generally the seller who pays the commission. The Trial Court concluded that the defendants would have expected Mullins to facilitate the transaction for a consideration. Thus, the fourth element was met and the evidence does not preponderate against this finding of the Trial Court. Tenn. R. App. P. 13(d).

The fifth factor in the implied contract analysis is whether it would be unjust for the party benefitting from Mullins' services to retain the benefits without compensating Mullins. As we stated, the evidence did not show that Lane benefitted from Mullins' services as a facilitator, but as to Young, she obtained 2.7 million dollars from the sale of the property to the buyer, a benefit which would not have been obtained if Mullins had not made the introduction, and to deny any compensation to Mullins would be unjust. Accordingly, the Trial Court's finding in favor of plaintiff against Young under the theory of quasi contract was not error and is affirmed.

Next, plaintiff makes the argument the Trial Court erred by not finding that a fee agreement existed as a contract implied in fact. Defendant argues in the reply brief that as plaintiff did not plead or argue at trial the existence of a contract implied in fact, plaintiff is barred from raising the issue on appeal. Plaintiff counters defendants' position by relying on Tenn. R. Civ. P. 8.01 which requires a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief the pleader seeks. Plaintiff contends the complaint set forth sufficient facts to plead a breach of contract and that it was unnecessary to specifically plead breach of a contract implied in fact. An examination of the complaint shows that plaintiff alleged that defendants "employed plaintiff as a facilitator", that defendants agreed to pay a facilitator's fee and that there was a written confirmation of the fee agreement. Young had signed a Confirmation of Agency status that confirmed plaintiff's status as a facilitator and thus, the complaint contains allegations for recovery due plaintiff under a theory of quasi contract. Moreover, there is nothing in the record that would indicate that counsel for defendants or the Trial Court had been put on notice that plaintiff was suing based on a theory of breach of contract implied in fact. The record does not support a finding that plaintiff put defendants or the Court on notice that it was relying on a theory of contract implied in fact, as this theory was never raised at trial, and plaintiff is precluded from raising the issue for the first time on appeal. *See, Correll v. E.I. DuPont de Nemours & Co.,* 207 S.W.3d 751, 757 (Tenn. ,2006).

Plaintiff and defendants appealed the Trial Court's award of damages and alleged the Trial Court's approach to the calculation of damages under the theory of quasi contract was error.

The Trial Court based its award of damages on evidence that the customary contingency fee in Knox County for the sale of raw land is 10 percent of the sale price. The Court said that 10 percent of the sale price was $270,000.00 but awarded only half of that amount to plaintiff based on the fact that Mullins only worked on the sale over a period of three days. Defendants contend the Trial Court's use of the customary 10 percent of the sales figure was error and that the Trial Court should have based the amount of damages on a reasonable value of the goods and services provided to defendants by Mullins over the three days he spent on the transaction.

Plaintiff contends that the parties had an oral contract that Mullin's would receive a commission of $200,000.00 for facilitating the sale of the property. As the Trial Court held, and we agree there was no oral contract, this issue has no merit. Next plaintiff argues that the proper measure of damages under the theory of quantum meruit should be based on the customs and practices prevailing in the same sort of business in which the services would normally be provided. *See Williams v. Coffey*, No. E2007-01476- COA-R3-CV, 2008 WL 1788060 at * 3 - 4 (Tenn. Ct. App. Apr. 21, 2008). Therefore, plaintiff contends the Trial Court should have based the amount of damages on 10 percent of the sales price. Plaintiff also argues the Trial Court erred when it did not include prejudgment interest in its award of damages.

We recently discussed the award of damages in the context of quasi contract in *Williams v. Coffey*, 2008 WL 1788060 at * 4.

In this regard plaintiff argues the reasonable method to arrive at plaintiff's fee was to use the customary commission fee of 10 percent of the sale price of raw land. A review of the testimony demonstrates two problems with this approach. First the testimony from the two realtors was that a 10 percent commission was customary on the sale of "raw" or unimproved land. However, there was no evidence that the Clear Springs Road property was unimproved. To the contrary, the testimony and Exhibit 8 show that the property was improved, at least to some extent, because the house the defendants lived in was on the property. Also, the Knox County tax record shows the property was improved by a residential ranch house that had been built in 1960. However, there was evidence indicating the customary commission on improved property was 6 percent. The import of the testimony, however, is that the 10 percent commission they discussed at trial was applicable to a listing agreement wherein the realtor was acting as the agent of the seller, and plaintiff goes to great length in its brief to refer to Mullins as a facilitator and not an agent. Tenn. Code Ann. § 62-13-102 (9) defines"Facilitator"as any licensee:

> (A) Who assists one (1) or more parties to a transaction who has not entered into a specific written agency agreement representing one (1) or more of the parties; or
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> (B) Whose specific written agency agreement provides that if the licensee or someone associated with the licensee also represents another party to the same transaction, such licensee shall be deemed to be a facilitator and not a dual agent; provided, that notice of assumption of facilitator status is provided to the buyer and seller immediately upon such assumption of facilitator status, to be confirmed in writing prior to execution of the contract. A facilitator may advise either or both of the parties to a transaction but cannot be considered a representative or advocate of either party. "Transaction broker" may be used synonymously with, or in lieu of, "facilitator" as used in any disclosures, forms or agreements under this chapter . . .

The parties do not dispute that Mullins acted as a facilitator as defined by the statute. However, there is no evidence in the record of what the customary commission or fee is in Knox County for a facilitator. For this reason, the Trial Court's reliance on the testimony of the realtors when it based the damage award on 10 percent of the sale place was misplaced. Courts will not award quantum meruit damages without some proof of the reasonable value of the goods and services rendered, *Castelli*, 910 S.W. 2d at 428, and courts should not base an award on a highly speculative assessment of damages. *In re Estate of Marks,* 187 S. W. 3d 21, 32 (Tenn. Ct. App. 2005)(citing *Adams v. Underwood,* 470 S. W. 2d 180, 184 (Tenn. 1971). Accordingly, the Trial Court based its award on speculative evidence. The burden was on plaintiff to prove in the trial court its entitlement to a judgment for services rendered on the basis of quantum meruit. This plaintiff failed to do with sufficient specificity. Defendants rely on decisions from other state courts that conclude that standard real estate percentage commissions do not reflect quantum meruit since such commissions may not reflect the value of the specific services performed by the realtor. *See, Marta v. Nepa*, 385 A. 2d 727 (Del. 1978 and *Ham v. Morris*, 711 S.W. 2d 187 (Mo. 1986). These courts essentially rejected the argument that a quantum meruit award should be based on usual and customary real estate contract commissions. In this case, the Trial Court should have determined the value of Mullins' time and effort and expenses Mullins devoted to the task of bringing the buyer and seller together over a period of three days, rather than relying on the non-specific testimony of Mullins and his expert regarding customary commissions in Knox County. We have not been provided with sufficient evidence upon which to determine an award. The case will be remanded back to the Trial Court for an evidentiary hearing regarding the actual value of Mullins' services facilitated to defendant, Ms. Young.

Finally, plaintiff appeals the Trial Court's denial of its demand for prejudgment interest. The evidence in this case shows that the obligation plaintiff claimed defendants owed was not certain and the obligation itself was in great dispute. In view of the evidence, the Trial Court did not abuse its discretion when it denied plaintiff's demand for prejudgment interest. *See, Myint v. Allstate Inc. Co.*, 970 S.W. 920, 927 (Tenn. 1998).

In sum, we affirm the Trial Court that there was no oral contract between the parties. Also we affirm the Trial Court's finding of an obligation under a theory of quasi contract, but reverse the Trial Court's holding that Lane was liable to Rocky Top pursuant to a quasi contract. The Judgment against Lane is set aside and he is dismissed from the action. Finally, we hold the Trial Court incorrectly based its award of damages on the customary commission of 10% of the sales price of raw land in Knox County. Accordingly, we remand the case for an evidentiary hearing to determine the actual value of services rendered by Mullins to Young as a facilitator to the transaction, and the Trial Court did not abuse its discretion when it denied plaintiff prejudgment interest on any recovery.

The cost of the appeal is assessed one-half to plaintiff and one-half to defendant Young.

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HERSCHEL PICKENS FRANKS, P.J.